I. Introduction

The current proposal to allow "DBS service providers, PCOs, and other MVPD providers not subject to Section 628" to enter into exclusive contracts with landlords, while prohibiting providers subject to Section 628 from doing the same, would have the following effects:

- Providers subject to Section 628 would be at an unfair competitive disadvantage, as they would not be able to serve the residents of MDU properties whose landlords desired the commissions that they receive when entering into exclusive contracts with PCOs, DBS service providers, and other providers not subject to Section 628.
- PCOs concede that communities would encounter discrimination based on their demographic characteristics.[1, 2] "Two Americas" would exist. Owners of single family homes would be able to receive the programming carried by providers subject to Section 628 (and to the FCC's "must carry" rules). Many of those who reside in apartment buildings and other MDU properties would be able to receive only the programming that aired on channels carried by PCOs or other providers not subject to Section 628. This would end America's proud legacy of making the same programming available to all its citizens without discrimination, and have grave political and economic consequences.
- Tenants would lose their last remaining defense against landlords who enter into exclusive relationships with abusive providers not subject to Section 628: the ability to move to another building where the exclusive provider is subject to Section 628.
- Tenants who wisely avoided abusive providers, such as the repeatedly criticized Consolidated Smart Systems[3], by moving to buildings where providers that they find acceptable (most of whom are subject to Section 628) held exclusive contracts now face the possibility of having to move yet again, because the FCC has voided the exclusive contracts held by those providers, thereby allowing the landlords to exclude those providers and sell exclusivity to abusive providers not subject to Section 628.

The Federal Communications Commission has both the statutory authority and the statutory obligation to prevent this.[4] Furthermore, the Constitution bars it from providing the providers who have expressed an intent to discriminate with assistance, in the form of regulations that allow them to hold exclusive contracts

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[1] Letter of Keven Coyle and Glenn Meyer, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519554365

[2] Letter of Mark Scifres, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519558902

[3] This "satellite television company" (as it describes itself at http://www.consolidatedsmart.com/faqs.asp) was the subject of comments already submitted by several of its victims, including myself (http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519124137), Delin Parada (http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519531835), and Pamela Fels (http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519723167).

[4] 47 U.S.C. §151

while prohibiting their competitors from doing the same, especially where the discriminating providers are able to obtain those contracts only because the Federal Communications Commission has honored their request to void certain existing contracts, without prohibiting them from entering into similar contracts.

II. "Two Americas"

A. Educational and economic issues

For reasons beyond the scope of these comments, owners of single family homes are predominantly white speakers of English, while residents of apartment buildings and other MDU properties are disproportionately poor and minority. (MDU residents account for fewer than 30% of the overall population, but nearly half of the minority population.[5]) As a result, English-speaking whites, who generally receive their programming from providers who are subject to Section 628, would continue to receive the programming that aired on the channels carried by those providers, while nonwhites and Hispanics would, if their landlords entered into exclusive contracts, receive only the programs shown on the channels offered by the non-628 providers selected by the landlords.

PCO Ygnition Networks and Pavlov Media admit that landlords and exclusive providers "tailor channel lineups specifically to the [perceived] demographic profiles of the residents"[6] and "customize our services … to each community's demographic mix"[7] or would do so. The possible results are alarming. If a landlord desired to serve Hispanic tenants, the landlord and the service provider might agree that only channels that broadcast only in Spanish would be made available to tenants. As a result, the tenants would no longer be able to learn English from watching English-language television programming. African-American tenants whose racist landlords believed them to be either incapable of learning, or simply lazy, would be informed that their landlord felt that they would not benefit from educational programming and had decided not to make it available to them. If the landlords perceived PBS as too intellectual to appeal to the building's "demographic", then even the two-year-old children in the building would be disadvantaged, by having to watch cartoons instead of "Sesame Street". In the 1960's, the federal government determined that educational disadvantage, *even as a preschooler*, would have lifelong consequences, and created the "Head Start" program in an attempt to prevent the inevitable results of the policy that Ygnition and Pavlov advocate: Children whose parents cannot afford to buy homes will enter school knowing less of the alphabet, receive lower grades, perpetuate the myth of racial inferiority on which the discriminators rely, grow up to hold lower paying jobs, be unable to afford to buy houses themselves, be forced to raise their own children in MDU properties, and become the next generation of tenants forced by landlords to deny their children equal access to educational television. The courts have

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[5] Letter of Dr. Vera McIntyre, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817282

[6] Letter of Keven Coyle and Glenn Meyer, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519554365

[7] Letter of Mark Scifres, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519558902

repeatedly found[8] that actions which *effectively* result in different educational opportunities for children living where most children are white and where most children are non-white constitute de facto racial discrimination, even if no discrimination based on the race of each individual occurs. Therefore, the Congressional mandate that the FCC "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color," etc.,[9] requires it to ensure that children of all races have the same access to programs that landlords feel, rightly or wrongly, will not appeal to children in their buildings.

The discrimination advocated by Ygnition and Pavlov would be more extreme than any faced by African-Americans since the abolition of slavery.[10] Although it was once common for African-Americans to be required to sit in the balcony of a movie theater, they at least saw the same film as the whites sitting below them. Under the scheme recommended by Ygnition and Pavlov, MDU residents will not merely watch separately, they will see different programs, which they will not be permitted to select. Even the discredited (and subsequently overturned) ruling in Plessy v. Ferguson[11] considered a case in which the segregated railroad passengers at least rode the same trains and reached the same destination, which was far less exclusive than the proposed effort to provide different programming based on demographic characteristics.

The comparison between the recommended discrimination and slavery does not end here: Ironically, but not surprisingly, the current argument that some persons are not capable of personally negotiating the price and quality of what they need, and must have an "owner" do so on their behalf, in spite of the obvious conflicts of interests, was also once a proslavery argument.

B. Cultural, social, linguistic and political significance

The cultural and social advantages of making all channels available to all citizens are also vital to the national interest and even to the political process. Common knowledge of the same stories – whether real or fictional – forms the basis for far more of language than is commonly recognized. For example, a person who has never read the works from which the idioms originated may use the words "Odyssey"[12] and "Shylock"[13]; use the phrases "pound of flesh"[14], "Cinderella story"[15],

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[8] Mainly in cases involving school district boundaries that prevented children from predominantly African-American neighborhoods from attending predominantly white schools, and vice versa

[9] 47 U.S.C. §151

[10] It is true that more extreme racial discrimination against other racial groups has occurred as recently as the first half of the 20th century, including the internment of Japanese-Americans during World War Two and the near-extermination of the Native American Indians. However, those atrocities began as emergency measures during wars. Ygnition and Pavlov admit to discrimination that has only economic or "demographic" purposes and that appears to have begun in peacetime.

[11] 163 U.S. 537 (1896)

[12] Originally the title of a work by Homer

[13] Originally from *The Merchant of Venice*, by William Shakespeare

[14] Originally from *The Merchant of Venice*, by William Shakespeare

[15] Referring to the fairy tale "Cinderella" and not to the movie "Cinderella Story"

or "Horatio Alger story"; or refer to a man in love as "Romeo"[16]. These terms originated as references to works that were once accessible to all (including the illiterate, who could see Shakespeare's plays performed and hear Homer's works recited by minstrels) and eventually became part of the vernacular, understand by those who were unfamiliar with the works, but understood the language that they had heard used. However, if a large segment of society never has access to the same fictional works, then a subculture develops that does not use exactly the same language and cannot fully understand the language of those who do. References to characters in programs available to tenants will appear in "ebonics" and references to characters in programs available to homeowners will appear in "standard" English. To prevent this, the Federal Communications Commission must fulfill its mandate "to make [access to the same programming] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color," etc.[17] Television should make it easier, not harder, for citizens of different backgrounds to communicate effectively with each other.

Although it is rare for most citizens to view the same channel simultaneously, and they should always have the right to "change the channel", common *access* to programming allows enough citizens in every demographic group to see the most popular programs for their existence (and a general idea of their content) to become common knowledge. For example, when President George Herbert Walker Bush spoke of making families "more like the Waltons", instead of "the Simpsons", the allusion to popular television programs was understood throughout the United States, as well in the United Kingdom[18, 19]. For better or for worse, in our increasingly secular society, television programming has replaced the Bible as the most commonly known reference to use in literary allusions. If the days when a person who said that a particular economic policy would "crucify mankind upon a cross of gold"[20] or that he "had been to the mountaintop and … seen the promised land… [and] we, as a people, will get there eventually"[21] could be universally understood are not already long gone, they will be when landlords enter into contracts that "tailor" or "customize" to a building's atheistic demographic, by excluding channels that carry programming about religion. If different programming is available to homeowners and tenants, and neither group is aware of what programming the other group watches, then future politicians will have to decide which programming to use in their allusions, and a substantial segment of the population will be effectively excluded from understanding their comments. In a particularly recent example of a comment that could only be understood by those with a certain level of knowledge of the world outside of their own building demographic, Commissioner Copps joked that Commissioner Adelstein "is seriously thinking about starting to eat fish on Fridays during Lent, and I'm looking into

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[16] Title character in *Romeo and Juliet*, by William Shakespeare
[17] 47 U.S.C. §151
[18] The Observer, "300 reasons why we love The Simpsons", http://observer.guardian.co.uk/review/story/0,6903,939751,00.html
[19] The BBC, "Is The Simpsons still subversive?", http://news.bbc.co.uk/2/hi/uk_news/politics/6252856.stm
[20] William Jennings Bryan, 1896
[21] Dr. Martin Luther King, Jr., comparing himself to Moses

what's involved in keeping kosher."[22] Although his audience was well-educated, many Americans learn about other cultures only through television. If landlords negotiate what channels will be provided in their apartment buildings based on the religion of their tenants, then few tenants will be able to use television to learn the meanings of the words "Lent" and "kosher" well enough to understand such a joke. This is no small problem; while Commissioner Copps is capable of speaking without humor, a society's ability to have intelligent discourse on nearly any topic, from whether to exempt conscientious objectors from conscription to whether to close public schools on a religious holiday when many students will be absent, inherently depends on some level of common understanding of its diverse religions.

During the Great Depression, President Roosevelt's fireside chats were heard by citizens of all economic levels, even those who were too poor to afford food, but still managed to purchase radios to be able to hear what the rest of the nation heard. Absurd though it may seem today, sharing in the common experience of hearing a politician speak actually held the nation together in one of its darkest hours. Later, on "a day that will live in infamy", Roosevelt again used the radio to rally the nation to join in the largest civilian mobilization in history. By contrast, Nazi Germany severely restricted radio ownership, in part to limit the ability of those citizens that it believed inferior to access information and alternative viewpoints, and lost the war. Today, the Federal Communications Commission faces the most important decision in its history: whether the United States will be a nation where all citizens have access to the same programming, or whether to create two classes of citizens: those who own homes and can decide what providers to select, based on what programming they wish to view, and tenants with access only to the programming carried by the channels that their landlords desire tenants to see.

III. Housing discrimination

Under the system proposed by Pavlov and Ygnition, landlords would have unlimited discretion to negotiate for any tailored channel lineup that they desired. Although they maintain that landlords would negotiate in good faith, based solely on their sincerely held prejudices that the race *already* living in their building does not desire the same programming as other races, just as many whites once believed that African-Americans did not desire to vote, there is no evidence that this would actually occur. Instead, landlords would be free to negotiate for programming that applied to the race that they *desired* to attract. Landlords preferring not to rent to families with children would negotiate for only channels that did not carry programming suitable for children. Landlords desiring not to rent to Hispanics would negotiate for only channels that aired no programs in Spanish.

Some of those who have submitted comments in favor of exclusive contracts have argued that tenants should be allowed to choose to move into a property with an exclusive contract that is acceptable to the prospective tenant, especially if the landlord has negotiated to have the provider offer a programming package that

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[22] Remarks of Commissioner Michael J. Copps [to] the Center for Christian-Jewish Understanding [of] Sacred Heart University, November 29, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278596A1.pdf

appeals to the prospective tenant.[23] For a prospective tenant to make such a determination, it is necessary for the landlord to notify the prospective tenant of the terms that were negotiated between the landlord and the provider, including, inter alia, the channel lineup, or, at the very least, the demographic characteristics to which the landlord has arranged to have the channel lineup tailored. The provision of the Fair Housing Act that prohibits "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference…based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination"[24] would be meaningless, as the preference of landlords would be clear from their advertisements or statements of what channels they had negotiated to offer. For example, stating or advertising whether the landlord had negotiated to make ESPN or Lifetime available, and had entered into a contract excluding all providers that offered the other of these networks, would clearly indicate the landlord's gender preference. Similarly, landlords seeking to avoid families with children would advertise or state that sexually explicit programming was available and all providers of programming appropriate for children were excluded. Finally, landlords with a racial or religious preference would request applicable cultural or evangelical stations be included and advertise the exclusion of all others. Those tenants who wanted their children to learn about their ethnic heritage from appropriate programming would then have to live where landlords choose not to exclude the providers of such programming. Under this system, citizens could exercise either their right to live in a neighborhood with persons of another culture, or to watch the television programming that they desired – but never both. Many, especially those with children too young to understand the need to make personal sacrifices to take a stand on a principle, would reluctantly choose to live in a property that did not exclude providers offering the programming that they need or desire, and de facto housing segregation patterns, which the United States had attempted to eliminate decades ago, would resume.

IV. Unfair competition

If any providers not subject to Section 628 are allowed to hold exclusive contracts, then all providers subject to Section 628 will be unable to serve the buildings where landlords elect to offer exclusivity to providers. Even in the buildings without exclusivity, providers subject to Section 628 must either provide service that is satisfactory to their customers or risk losing dissatisfied customers – as any business should. However, providers not subject to Section 628 and utilizing

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[23] I know of no documented cases of such an event, and believe that the exclusive contracts are rarely, if ever, disclosed to tenants until after they have agreed to rent the premises. Additionally, many tenants have commented that the exclusive providers overcharged them, provided inferior service, or otherwise treated them in a manner that they could not have reasonably anticipated, even if they had known of the exclusivity. However, viewing the facts in the light most favorable to exclusivity, it is theoretically possible that a future informed tenant might knowingly move into a building with an exclusive contract.

[24] 42 U.S.C. 3604(c), FHA §804(c)

a business model of serving *only* those properties where they hold exclusive contracts, as several PCOs conceded they do[25], do not face this risk.

In the original comment period, the pro-exclusivity commenters conceded that there is a substantial initial cost to serve a building that a provider can only recover if the provider has a reasonable assurance of being able to continue to serve the building for many years. A provider subject to Section 628 will not be able to make such an investment because of the threat that, at any moment, a provider not subject to Section 628 may be given an exclusive contract. While all providers should run the risk that they may lose *individual* customers if a competitor offers *to the customer* something that *the customer* perceives to be superior, they should not be threatened with being entirely excluded from the market *by a third party*, and losing *all* their customers, even if those customers are satisfied and wish to continue to receive the company's services.

Because exclusivity provisions inherently remove the need to offer competitive prices or quality service to anyone other than the landlord, these buildings are the most lucrative. As a result, providers subject to Section 628 will be excluded from the most profitable segment of the market and will have to offer service at low enough rates to attract customers away from their competitors, while risking being excluded by landlords, and while providers not subject to Section 628 will be able to charge any rate that the landlord allows.

V. Legal Authority of the FCC and Legal Obligations of the FCC

The FCC can and does regulate parties not subject to Section 628 for the purpose of protecting commerce under its jurisdiction. As the Federal Communications Commission is aware, Congress has given it the authority to grant licenses to television broadcasters wishing to transmit across state lines. As a matter of decided law, the power to grant a federal license to engage in an activity that inherently involves getting something from one state to another state takes precedence over private contracts. In the earliest case on point[26], Gibbons held a federal "coasting" license (allowing him to transport persons by water from New Jersey to New York), but another party held a contract granting the latter party exclusivity with respect to New York-bound steam-powered vessel operation. In a ruling that was later reversed, Chancellor James Kent[27] held that federal power to regulate interstate commerce was concurrent with the powers of lesser entities to issue exclusive contracts. However, the United States Supreme Court instead found that the federal power to license commercial interstate operations necessarily took precedence and included the power to authorize operations otherwise proscribed by exclusive contracts.[28] Therefore, the Federal Communications Commission has the authority to protect the transmission of television programming from WWOR (a licensed broadcaster in Secaucus, NJ) to the television of a tenant in a New York City apartment building, even if that tenant's landlord grants an exclusive contract

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[25] Letter of Daniel Terheggen, owner of PCO Consolidated Smart Systems, June 27, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519550894, et al.

[26] Gibbons vs. Ogden

[27] The judge who heard the case at the state level

[28] Gibbons vs. Ogden, 1824

to a PCO that does not carry that station. The Federal Communications Commission has previously exercised its power to engage in "preemption" of "any private covenant, contract provision," etc., that impairs the receipt of television programming by tenants, *even where none of the parties are subject to Section 628*.[29]

The better question is whether such action by the FCC is discretionary or obligatory. For the answer to this question, we need look no further than the legislation establishing the FCC and requiring it "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color," etc., access to global communications networks.[30] As noted earlier, the courts have repeatedly found[31] that actions which effectively result in different educational opportunities for children living where most children are white and where most children are non-white constitute de facto racial discrimination, even if no discrimination based on the race of each individual occurs. Therefore, even if the FCC favored that the offensive system of different offerings based on "demographic" characteristics that Ygnition and Pavlov advocate, it would be obliged to ensure that no such system was implemented, unless Congress itself altered the law. Where Congress specifically instructs an agency to take an action, that agency does not have the discretion to substitute its own judgment.

Furthermore, even if Congress desired to allow such discrimination, it could not do so. The specific facts of this dispute are sufficient to establish that a contract on the terms advocated by Ygnition, Pavlov, Consolidated Smart Systems, et al, would be subject to the Fourteenth Amendment. First, the power to license (or refuse to license) television service providers has historically been a governmental function, and creative methods of transferring a "public function" to "private parties", especially to parties intent on discrimination, do not remove that function from the sphere of the Fourteenth Amendment.[32] Second, the providers who are excluded by contracts and the tenants who seek the services of those providers are "willing sellers" and "willing purchasers", who, but for the judicial enforceability of the exclusive contracts, could enjoy the same property rights as other citizens, making the judicial enforceability of the exclusive contracts a state action, which "cannot stand", according to the United States Supreme Court.[33] In this case, the providers not subject to Section 628 seek not only to be able to enforce the exclusive contracts in state court, *but also request that the assistance of the Federal Communications Commission in ensuring that the exclusive contracts are awarded to them and not to their larger (i.e., more successful), franchised competitors* subject to Section 628.[34, 35] As a matter of law, an otherwise private action that is only

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[29] 47CFR Chapter I, Subchapter A, Part 1, title of Subpart S; 47CFR1.4000(a)(1)

[30] 47 U.S.C. §151

[31] Mainly in cases involving school district boundaries that prevented children from predominantly African-American neighborhoods from attending predominantly white schools, and vice versa

[32] Evans v. Newton, 382 U.S. 296 (1966)

[33] Shelly v. Kraemer, 334 U.S. 1 (1948)

[34] "exclusive contracts should be awarded to PCO's and not to the franchise cable operators", Daniel Terheggen, owner of PCO Consolidated Smart Systems, June 27, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519550894

[35] ; "allow exclusive contracts … only for those providers that do not have market power and fall below the FCC definition of 'small'", Keven Coyle and Glenn Meyer, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519554365

possible through the "participation of the government" inherently rises to the level of a state action fully subject to all Constitutional restrictions, including the equal protection provisions of the Fourteenth Amendment.[36]

VI. First Amendment issues

The United States Supreme Court found that granting any individual "unbridled discretion" to decide "whether to permit or deny" the selling of the fruits of an "expressive activity" in a particular place puts "significant pressure" on any entity that "relies to a substantial degree on" those sales (that the individual can prohibit) "to endorse" that individual "or to refrain from criticizing him, in order to receive a favorable and speedy disposition…", that "[t]he mere existence of … unfettered discretion… intimidates parties into censoring their own speech, even if the discretion and power are never actually abused", and that allowing such discretion is unconstitutional, even where the activity being restricted is one that "may be prohibited entirely" without violating the Constitution.[37] Similarly, it is inevitable that television stations which depend on tenants' ability to view their programs will conform their news departments' editorial policies to be acceptable to local landlords, or at least refrain from airing editorials critical of those politicians who also own rental properties. This is precisely the result that the Supreme Court held must be avoided.

As noted elsewhere in this filing, although the prohibiting of a provider by a landlord is not inherently a "state action" subject to the First Amendment, the specific facts of this dispute are sufficient to establish that a contract on the terms advocated by Ygnition, Pavlov, Consolidated Smart Systems, et al, would be subject to the First Amendment. To reiterate, the power to license (or refuse to license) television service providers has historically been a governmental function, and creative methods of transferring a "public function" to "private parties" do not remove that function from the sphere of the Constitutional granted personal freedoms.[38] Second, the providers who are excluded by contracts and the tenants who seek the services of those providers are "willing sellers" and "willing purchasers", who, but for the judicial enforceability of the exclusive contracts, could enjoy the same property rights as other citizens, making the judicial enforceability of the exclusive contracts a state action, which "cannot stand", according to the United States Supreme Court.[39] In this case, the providers not subject to Section 628 seek not only to be able to enforce the exclusive contracts in state court, *but also request that the assistance of the Federal Communications Commission in ensuring that the exclusive contracts are awarded to them and not to their larger (i.e., more successful), franchised competitors* subject to Section 628.[40, 41] As a matter of law, an

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[36] Edmonson v. Leesville 50 U.S. 614 (1991)
[37] Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)
[38] Evans v. Newton, 382 U.S. 296 (1966)
[39] Shelly v. Kraemer, 334 U.S. 1 (1948)
[40] "exclusive contracts should be awarded to PCO's and not to the franchise cable operators", Daniel Terheggen, owner of PCO Consolidated Smart Systems, June 27, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519550894
[41] ; "allow exclusive contracts … only for those providers that do not have market power and fall below the FCC definition of 'small'", Keven Coyle and Glenn Meyer, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519554365

otherwise private action that is only possible through the "participation of the government" inherently rises to the level of a state action fully subject to all Constitutional restrictions.[42]

VII. Allowing any exclusive contracts between landlords and video service providers would be unwise

Doing so would, for example:

- lead service providers to compete for landlords (primarily through higher commission payments) and not for customers (through lower prices, superior service, etc.)
- be contrary to the interest of tenants, who would be prevented from choosing service providers based on their own personal needs
- force service providers to charge rates high enough to recover the cost of commission payments to landlords
- allow service providers to raise prices or provide inferior service, without fear of losing customers to competitors

These issues were discussed at length during the original comment period and further discussion would be redundant. The current proposal to allow holding of such contracts only by "service providers, PCOs, and other MVPD providers not subject to Section 628", differs from allowing all providers to hold such contracts mainly in that it would put providers subject to Section 628 at an unfair competitive disadvantage, as discussed elsewhere in this filing.

VIII. Allowing any exclusive contracts is against the policy of the United States

The Sherman Antitrust Act declares all exclusive contracts that restrain third parties from engaging in interstate commerce with each other to be illegal. Entering into such a contract is a felony, punishable by, inter alia, three years in federal prison.[43] Congress has made clear its opposition to such contracts. Contracts between landlords and service providers do precisely what this law was intended to prohibit: they prevent the tenants, who are not parties to the contract, and those providers who are not are parties to the contract, from engaging in interstate commerce with each other.

While individual citizens may debate the merits of this law, and may even choose to question the wisdom of Congress, the FCC is obliged to respect the views of Congress, and to refrain from substituting its own judgment for that of duly elected legislators. If citizens believe that exclusive contracts are in the public interest, they are free to petition *Congress* (not the FCC) to alter the law, but the FCC must not ignore Congress or unilaterally change national economic policy. The obligation of Presidential appointees to follow the decisions of elected legislators is what fundamentally distinguishes a democracy from a dictatorship.

IX. Inadequacy of the "OTARD" rules

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[42] Edmonson v. Leesville 50 U.S. 614 (1991)

[43] 15 U.S.C. §1-3

A. Inapplicability of the OTARD rules to DBS service in most MDU properties

This rulemaking proceeding concerns primarily rental apartments. In the majority of such cases, the user has exclusive use and control of only the interior of the apartment. The OTARD rules only apply to rental property in the extremely rare cases where it is possible for the tenant to receive service with an antenna located "on property within the exclusive use or control of the antenna user"[44]. DBS service requires outdoor antennas with a clear, unobstructed view of the southern sky.[45] Most tenants either (a) do not have exclusive use and control of any outdoor property suitable for an antenna or (b) do not have a clear, unobstructed view of the southern sky from the property that is within their exclusive use and control. Although the Federal Communications Commission's website suggest that balconies and terraces may be used[46], many of these are unusable for DBS antennas, either because they face northward or because of obstructing buildings, trees, etc.

B. **The FCC has determined that the OTARD rules protect tenants *only* where a prohibited restriction *actually* exists, and do not protect tenants whose landlords falsely claim that a restriction exists**

Even in the rare cases where it is technically possible for tenants to operate an antenna on property subject to the OTARD rules, it is in the interests of both landlords and providers to lie to the tenants and misinform them that they are prohibited from operating their own antennas, as both Consolidated Smart Systems and my own former landlord did. When I submitted a letter from this landlord containing a statement of a restriction prohibiting operation of individual antennas and a petition for a declaratory ruling that said restriction was prohibited by the OTARD rules, the Federal Communications Commission correctly ascertained that the landlord's statement did not match the actual lease provision. Although the restriction that the landlord told me existed would have been prohibited (if it actually existed), there was no such restriction in reality, so no OTARD violation had occurred. Unfortunately, by the time that I received notification from the Federal Communications Commission that the disputed restriction did not exist (neither the landlord nor the provider ever admitted this to me), my tenancy had already been terminated because I had made a request that *would have been* my right under federal law[47], *if* the prohibited restriction had existed. Furthermore, had the prohibited restriction existed, then the termination of tenancy would have violated a state law providing that "[i]t is unlawful for a lessor to … cause a lessee to

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[44] 47CFR1.4000

[45] http://www.fcc.gov/ownership/materials/already-released/survivor090002.pdf, http://www.fcc.gov/Bureaus/Cable/Notices/2001/fcc01263.doc

[46] http://www.fcc.gov/cgb/consumerfacts/consumerdish.html

[47] Specifically, the right of tenants in buildings with central antenna systems and prohibitions against individual antennas to receive service at a cost no greater than the cost of individual antenna service, and to receive the same service as would have been available with an individual antenna, as provided in the Federal Communications Commission's own decision *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83, Order on Reconsideration, Q.2.88 and Q.2.89

quit involuntarily, bring an action to recover possession, or threaten to do any of those acts, for the purpose of retaliating against the lessee because he or she has … has lawfully and peaceably exercised any rights under the law"[48] and would be liable to me for "[t]he actual damages sustained"[49] "in addition to any other remedies provided by statutory or decisional law."[50] Additionally, if the civil court found he was "guilty of fraud, oppression, or malice with respect to that [prohibited retaliatory] act", then he would be liable to me for "[p]unitive damages in an [additional] amount of not less than one hundred dollars ($100) nor more than two thousand dollars ($2,000) for each [such] retaliatory act".[51] However, because the Federal Communications Commission determined that the landlord's letter containing the fictitious restriction was a "misstatement"[52], and that no prohibited restriction actually existed, I had no rights under the OTARD rules and cannot bring suit for retaliation to recover the damages I sustained because I relied to my detriment on the landlord's statement that the rule existed.[53] *The great irony of this situation is that being falsely informed that I was prohibited from having an individual antenna caused me greater harm than an actual prohibition would have caused.* Although the particular details of this situation are unusual, **a false statement that individual antennas are prohibited and will result in eviction prevents tenants from obtaining service from any provider other than the holder of the exclusive contract and has the same negative effects as an actual restriction, but is not prohibited by the OTARD rules.**

In case this filing is being reviewed by different staff members than the original petition, I will summarize the relevant details.

Consolidated Smart Systems and my former landlord entered into an exclusive contract. This is not in dispute. I then met with an employee or representative of Consolidated Smart Systems and, as stated in an affidavit sworn under penalties of perjury, which has been submitted separately to the Federal Communications Commission[54]:

> I decided that, although I did wish to continue to receive television service, I wanted to do so from a company other than the company that he represented. When I asked if I could obtain an individual antenna from another company, he said that the Consolidated had an "exclusive contract" (I now assume this to be the "lease" later mentioned by Mr.

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[48] Section 1942.5(c) of the California Civil Code
[49] Section 1942.5(f)(1) of the California Civil Code
[50] Section 1942.5(g) of the California Civil Code
[51] Section 1942.5(f)(2) of the California Civil Code
[52] Letter from the Federal Communications Commission. Although the word "misstatement" was used in that letter, I believe that the phrase "false statement" would be more appropriate, because "misstatement" implies an honest mistake, rather than an intentional deception. As there is evidence of fraud, and no evidence of accidental error, it is premature for federal employees to the draw any conclusion with respect to the question of intent, until it is properly adjudicated in civil court.
[53] Although it might be possible to bring suit for fraud, that theory of law is irrelevant to the present rulemaking process.
[54] With the petition for a declaratory ruling, received by the Federal Communications Commission in April 2007.

> [former Landlord's last name redacted from ECFS filing]) to provide television services in the building…
>
> I expressed [to my former landlord] my desire to obtain service from a provider other than Consolidated and he told me that he had "signed a lease" with Consolidated agreeing to "enforce" a rule prohibiting me from obtaining service from any other provider…
>
> After I complained about the increase in cost and not being notified earlier, he sent me another letter (petitioner's exhibit A[55]), informing me that he was the landlord, that I was prohibited by the rules of the building from having my own antenna anywhere in the complex, even within my apartment, and that he would evict me if I did not obey the rules of the building. In this letter, he noted that both "satellite dishes" and "antennae" [sic] were prohibited, making it clear that I would risk eviction if I operated any individual antenna, even the analog antenna that I had obtained for receiving (for free) local broadcast signals, and not only if I obtained (at my expense) satellite television service from an individual antenna.

Nevertheless, I eventually decided to terminate the services of Consolidated Smart Systems due to their commission of various acts of fraud, beyond the scope of this filing. After I had terminated their services, they agreed to remove their equipment from my apartment by the end of February 2006, but still have not done so. After they breached several agreements, including the agreement to restore possession of the portion of the apartment occupied by their equipment to me, I sent them a notification to either vacate or pay rent for the space that they were unlawfully continuing to occupy. Under California law, they had three days to comply, unless the notification was legally invalid.[56] In relevant part, their response[57] continued to perpetuate the false claim that I did not have the option to use another provider:

> We at CSS received your legal notices. Upon the review of what you have sent over and requested we are going to be able to provide you the following:…
>
> 2. *If you wish to receive TV, the only option at Ponderosa will be the $29.99 Preferred Choice Package*. …
>
> If you ARE NOT interested in continuing your service… we can schedule a technician to come pick up [the equipment]. *Once again, there is no other way to receive television- but to go through Consolidated*. ...
>
> -Consolidated Smarts Systems
> (1800) 262-1327

[Emphasis added]

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[55] Submitted to the Federal Communications Commission with the petition for a declaratory ruling, received by the Federal Communications Commission in April 2007.
[56] The validity of the notification is questionable, but irrelevant to the OTARD issue.
[57] "CSS Update", e-mail from Trishna Patel <trishnap@consolidatedsmart.com>, timestamp Monday, March 26, 2007 4:59:43 PM, California time

X. Tenants have consistently expressed a desire to receive service from providers subject to Section 628, such as Time-Warner, and not from the providers that are currently permitted to hold exclusive contracts, such as Consolidated Smart Systems

A. Introduction

Many persons reside in buildings where PCOs, satellite companies, etc., hold contracts containing exclusivity provisions. More notably, most or all comments that I have found from tenants who find the exclusive contracts in their buildings objectionable concern contracts held by PCOs, satellite companies, etc., not providers subject to Section 628.

B. Comments submitted in response to the original NPRM

When I reviewed comments submitted in response to the original NPRM, every comment that I found from a resident of a property subject to an exclusivity clause expressed dissatisfaction with the service provided by DBS service providers, PCOs, and other MVPD providers not subject to Section 628. At the time of my last review, the most recent such comments were those of Robert Davis[58] regarding the PCO "Ygnition Networks", which were admittedly not filed until long after the official close of the comment period. However, Mr. Davis explains that the exclusivity prevented him from obtaining DSL, which could have been used to submit his comments more quickly through ECFS. A single company, Consolidated Smart Systems, which describes itself as a "satellite television company"[59] was the subject of at least three such comments from California alone, including those of myself[60], Delin Parada[61], and Pamela Fels[62]. It is unclear how many more victims of exclusivity provisions exist, but have still not be able to submit comments through ECFS because, as Delin Parada and Richard Davis have both reported, exclusive providers regularly make it impossible for residents to access the internet at reasonable speeds and prices. (Mr. Davis reports being unable to obtain DSL at all and reports "deplorable" internet access speeds; Delin Parada reports having to pay twice as much as Verizon charges for a line at half the speed offered by Verizon.)

C. Excerpts from Internet postings by tenants who desire to obtain or retain service from a cable company subject to Section 628, and who are prevented from doing so by exclusive contracts held by Consolidated Smart Systems

A tenant in Los Angeles, California, wrote:

> …what really pisses me off is that I can't just switch to cable. That's right, because the building management, in their infinite wisdom, made an exclusive deal with this company [Consolidated Smart Systems] and

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[58] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519809599
[59] http://www.consolidatedsmart.com/faqs.asp
[60] http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519124137
[61] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519531835
[62] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519723167

> BANNED THE CABLE COMPANY [a provider subject to Section 628] from the building. So[,] if you want TV[,] you have to deal with these a--holes.[63]

A tenant in San Diego, California, wrote:

> We had time warner cable [a provider subject to Section 628] with digital recording service (run through cable line). We are now being forced into contract with consolidated smart systems (which contracts with DirectTV), [and are] no longer able to select what provider we would like to go with (NAZI CAMP!!).[64]

A tenant in Corona, California wrote:

> My Apt Complex is switching to Consolidated Smart Systems. We have been told repeatedly with the use of flyers posted on our front doors that; quote "Your community has chosen Consolidated Smart Systems to be your sole Television Service provider. Time Warner [a provider subject to Section 628] will no longer be able to provide ANY television or Internet services when we finish upgrading your community.(Printed in red) Please do not cancel your current cable service, it will disconnect automatically"etc... What can I do about this ? I'm very nervous about this switch due to earning my living with my PC and having a reliable connection to the Internet. Currently my ISP is Time Warner and for cable TV. In addition[,] having cable TV is my only source of entertainment for myself and my family. We do not own a car and are low income. Is there anything we can do about the quality of service from this provider ? I'm afraid we are not going to have with this hack of a company ? Any suggestions what-so-ever[sic] ? Can this be stopped ? Please help me, any day now the switch will take place ![65]

D. Conclusion

From the above research, it is clear that many persons reside in buildings where PCOs, satellite companies, etc., hold contracts containing exclusivity provisions. Also, all the complaints that I found from tenants responding to the original NPRM concerned providers *not* subject to Section 628. I concede that this does not necessarily prove that most MDU residents who were restricted by exclusive contracts resided in buildings where the exclusive providers were "DBS service providers, PCOs, and other MVPD providers not subject to Section 628". An alternative explanation is that providers subject to Section 628 may have provided sufficiently better service for the tenants in those buildings not to feel a compelling need to contact the FCC. In either case, it is unfortunate that the FCC has

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[63] Previously posted at http://www.apartmentratings.com/rate/CA-Los-Angeles-Wilshire-Royale-Apartments-552114.html. No longer available at that link. Relevant part of original post quoted in full at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519124137, page 28.

[64] http://www.apartmentratings.com/rate/CA-San-Diego-Coral-Bay-Apartments-373844.html

[65] http://www.dslreports.com/comments/2867

prohibited providers subject to Section 628, about whom the tenants did not complain, from holding exclusive contracts, while perversely allowing the providers who were the subject of complaints to continue holding contracts that exclude the satisfactory providers and even to obtain exclusive contracts for buildings where providers subject to Section 628 previously held contracts that have not expired.

XI. The arguments previously advanced for allowing any exclusivity do not apply to the current proposal

A. The theoretical need for defensive contracts to ensure against being excluded by contracts held by competitors subject to Section 628 has been eliminated

During the original comment period, several comments were made concerning the reasons why DBS service providers, PCOs, and other MVPD providers not subject to Section 628 required exclusive contracts at those properties that they choose to serve, because providers subject to Section 628 had exclusive contracts at those properties that the latter providers were allowed to serve. Now that the Federal Communications Commission has voided the contracts held by providers subject to Section 628, these arguments no longer apply. Chief among these reasons was the allegation that providers subject to Section 628 were obtaining exclusive contracts through unethical, extortionate, or illegal means, and that other providers needed their own contracts to ensure that they were not excluded. Now that providers subject to Section 628 cannot hold exclusive contracts, other providers no longer risk being excluded by those contracts, and can no longer claim a need for defensive contracts. Although I do not agree that there was ever a need for defensive exclusive contracts, the issue is now moot.

B. Any pretense of tenant choice is destroyed by voiding some contracts while allowing others

Proponents of exclusive contracts also claim that tenants in buildings with exclusive contracts have chosen to live in such properties, knowing which company held the exclusive contract, and finding it acceptable. Because contracts held by providers subject to Section 628 have been voided, any such hypothetical tenant who elected to live in a building where an exclusive contract was held by a provider subject to Section 628 and acceptable to that tenant, specifically to ensure the continued availability of service acceptable to that tenant, now faces the awarding of an exclusive contract to a different provider who the tenant finds unacceptable, and the exclusion of the provider who previously satisfied the tenant under the terms of the voided contract.

Ironically, by prohibiting providers subject to Section 628 from holding exclusive contracts, the Federal Communications Commission has unintentionally denied tenants the only defense that they ever had against abusive treatment by providers not subject to Section 628: the tenants' former ability to move to a property where a provider subject to Section 628 holds the exclusive contract. As long as new exclusive contracts are permitted, moving to a building with no exclusive contract is not an adequate remedy, because the acceptable provider may be excluded from that building at any future time.

XII. Other specific questions asked in the Further Notice of Proposed Rulemaking

1. "Do DBS service providers, PCOs, and other MVPD providers not subject to Section 628 use any or all forms of exclusivity clauses (building, wire, and/or marketing)?"

As noted earlier, when I reviewed comments submitted in response to the original NPRM, every comment that I found from a resident of a property subject to an exclusivity clause expressed dissatisfaction with the service provided by DBS service providers, PCOs, and other MVPD providers not subject to Section 628. The most recent such comments were those of Robert Davis[66] regarding the PCO "Ygnition Networks", which were admittedly not filed until long after the official close of the comment period. However, Mr. Davis explains that the exclusivity prevented him from obtaining DSL, which could have been used to submit his comments more quickly through ECFS. A single company, Consolidated Smart Systems, which describes itself as a "satellite television company"[67] was the subject of at least three such comments from California alone, including those of myself[68], Delin Parada[69], and Pamela Fels[70]. It is unclear how many more victims of exclusivity provisions exist, but have still not be able to submit comments through ECFS because, as Delin Parada and Richard Davis have both reported, exclusive providers regularly make it impossible for residents to access the internet at reasonable speeds and prices. (Mr. Davis reports being unable to obtain DSL at all and reports "deplorable" internet access speeds; Delin Parada reports having to pay twice as much as Verizon charges for a line at half the speed offered by Verizon.) Therefore, it is clear that many persons reside in buildings where PCOs, satellite companies, etc., hold contracts containing exclusivity provisions. However, this does not necessarily prove that most MDU residents who were restricted by exclusive contracts at the time were residents of buildings where the exclusive providers were "DBS service providers, PCOs, and other MVPD providers not subject to Section 628". An alternative explanation is that providers subject to Section 628 may have provided sufficiently better service for the tenants in those buildings not to feel a compelling need to contact the FCC. In either case, it is unfortunate that the FCC has prohibited providers subject to Section 628, about whom the tenants did not complain, from holding exclusive contracts, while perversely allowing the providers who were the subject of complaints to continue holding contracts that exclude the satisfactory providers and even to obtain exclusive contracts for buildings where providers subject to Section 628 previously held contracts that have not expired.

2. "If they do, what kinds of exclusivity do those clauses provide?"

Unfortunately, most of these clauses are so contrary to the interests of tenants that they must be kept strictly confidential lest tenants learn the extent to which their landlords are willing to harm the tenants. The few clauses that may be

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[66] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519809599
[67] http://www.consolidatedsmart.com/faqs.asp
[68] http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519124137
[69] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519531835
[70] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519723167

(or have been) voluntarily disclosed are the least unfavorable to tenants and are not representative.

Although both Consolidated Smart Systems and my former landlord have both stated that they have an exclusive contract and that I was prohibited from violating it, my former landlord refused my request for a copy and eventually terminated my tenancy rather than provide a copy to me (which I desired in order to challenge its exclusion of individual antennas as a violation of the OTARD rules).

There are only two ways for the FCC to learn the true answer to its question:

- It may purchase MDU properties itself (under a pseudonym) and see what contractual provisions are offered to it.
- If it holds a hearing, then it can exercise its power under Subpart B of its regulations to issue a subpoena duces tecum for the contracts.

3. "What are the effects of the use of exclusivity clauses by MVPD providers not subject to Section 628 on consumer choice, competition for multi-channel video and other services, and on the deployment of broadband and other advanced communications facilities?"

Consumers in properties with exclusivity clauses have no choice. This applies whether or not the provider is subject to Section 628. Exclusivity means that providers compete only for landlords, not for consumers.

Exclusive providers regularly make it impossible for residents to access the internet at reasonable speeds and prices. Richard Davis reports being unable to obtain DSL at all and reports "deplorable" internet access speeds.[71] Delin Parada reports having to pay twice as much as Verizon charges for a line at half the speed offered by Verizon. [72]

4. "Are those effects and the balance of benefits and harms the same as we have found with respect to the use of exclusivity clauses by providers that are subject to Section 628?"

Ironically, I have found numerous examples of consumers reporting negative effects of exclusivity clauses in contracts held by providers that are not subject to Section 628, but I have not found these effects to occur in cases where the exclusive providers are subject to Section 628. In fact, I found more reports by consumers of being harmed by exclusive contracts held by Consolidated Smart Systems[73] than I have found concerning contracts held by all providers subject to Section 628, combined.

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[71] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519809599
[72] http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519531835
[73] http://www.dslreports.com/comments/2867, http://www.dslreports.com/forum/r17685732-Is-there-any-way-out, http://archive.tivocommunity.com/tivo-vb/history/topic/86524-1.html, http://www.apartmentratings.com/rate/CA-San-Diego-Coral-Bay-Apartments-373844.html, http://www.apartmentratings.com/rate/CA-San-Diego-Coral-Bay-Apartments-702781.html

5. "If the net effect of the use of exclusivity clauses by MVPD providers not subject to Section 628 is harmful to consumers, what remedy should we impose – the same kind of prohibition we adopt in the *Report and Order*, or something different?"

Considering the extent of consumer dissatisfaction with companies such as Consolidated Smart Systems and Ygnition, I wish that the FCC could simply prohibit these providers entirely. At an absolute minimum, they should be subject to all restrictions that apply to other providers, including being subject to the prohibition of exclusivity clauses and being subject to Section 628.

6. "Does the Commission have the authority to regulate the use of exclusivity clauses by MVPD providers not subject to Section 628. Does the commission have authority over DBS providers under Section 335 of the Act. Does the Commission have authority over DBS and other providers under Title III generally, Title VI, its ancillary authority, or some other source? We ask for comment on all the foregoing factual, analytical, and legal issues."

The FCC can and does regulate parties not subject to Section 628, Section 335, or any other provision of the Act, for the purpose of protecting commerce under its jurisdiction. As the Federal Communications Commission is aware, Congress has given it the authority to grant licenses to television broadcasters wishing to transmit across state lines. As a matter of decided law, the power to grant a federal license to engage in an activity that inherently involves getting something from one state to another state takes precedence over private contracts. In the earliest case on point[74], Gibbons held a federal "coasting" license (allowing him to transport persons by water from New Jersey to New York), but another party held a contract granting the latter party exclusivity with respect to New York-bound steam-powered vessel operation. In a ruling that was later reversed, Chancellor James Kent[75] held that federal power to regulate interstate commerce was concurrent with the powers of lesser entities to issue exclusive contracts. However, the United States Supreme Court instead found that the federal power to license commercial interstate operations necessarily took precedence and included the power to authorize operations otherwise proscribed by exclusive contracts.[76] Therefore, the Federal Communications Commission has the authority to protect the transmission of television programming from WWOR (a licensed broadcaster in Secaucus, NJ) to the television of a tenant in a New York City apartment building, even if that tenant's landlord grants an exclusive contract to a PCO that does not carry that station. The Federal Communications Commission has previously exercised its power to engage in "preemption" of "any private covenant, contract provision," etc., that impairs the receipt of television programming by tenants, *even where none of the parties are subject to Section 628. Section 335, or any other provision of the Act.*[77]

A more complex question would be whether the Federal Communications Commission has the authority to grant these providers preferential treatment, by prohibiting only providers subject to Section 628 from holding exclusive contracts,

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[74] Gibbons vs. Ogden

[75] The judge who heard the case at the state level

[76] Gibbons vs. Ogden, 1824

[77] 47CFR Chapter I, Subchapter A, Part 1, title of Subpart S; 47CFR1.4000(a)(1)

without requiring all providers to comply with the same prohibition against exclusivity clauses. In light of the previously raised arguments concerning the Fair Housing Act, the First Amendment, and the Fourteenth Amendment, it is doubtful that any agency has that authority.

7. "We also seek comment on whether the Commission should prohibit exclusive marketing and bulk billing arrangements. For example, we are aware that certain clauses in contracts allow one MVPD into a MDU or real estate development but constrain the ability of competitive MVPDs to market their services directly to MDU residents. These arrangements provide for what is called "marketing exclusivity," and may be anticompetitive. Some argue that in order for MDU residents to exercise freely their choice, they must know about their MVPD options."

Personally, I oppose these arrangements and agree that MDU residents should be allowed to know all their options. However, I do not agree that these agreements would make direct marketing impossible. Provided that (1) all providers are free to use direct mailings to tenants' addresses to market their services to tenants and (2) tenants are not misled to believe that the services advertised in periodicals or on the Internet are not available in the building subject to these agreements, I feel that these agreements, although anticompetitive, are fair less egregious than exclusive access agreements.

However, if a landlord or provider dishonestly represents to tenants that they can receive service only from the provider holding the exclusive marketing contract, then the exclusive marketing agreement would have the same effect as an exclusive access agreement. In particular, such a party might tell tenants that any service provider that they see advertised in the newspaper, through the mail, on the Internet, or in any other medium that is not subject to the exclusive contract, is being advertised to homeowners or to tenants of other buildings, and is not available in the building subject to the contract. This practice should definitely not be allowed, and should be criminally prosecuted as an act of fraud.

Of course, agreements that prohibit even the delivery by the United States Postal Service of mail advertising the services of other providers are most likely in violation of existing laws pertaining specifically to the delivery of mail, and therefore cannot be legalized by the Federal Communications Commission.

8. "Is our legal authority to address such [exclusive marketing] agreements the same as our legal authority for addressing exclusive access arrangements?"

No, because the FCC licenses only the providing of service, and not the advertising of service, Gibbons vs. Ogden does not provide the same legal authority with respect to marketing as it does with respect to access. However, authority may exist under various other theories of law, including the Constitutional arguments advanced earlier.

9. "We also seek comment on these same questions with respect to "bulk billing" arrangements… because of the "bulk billing" nature of the contract, residents would have to continue paying a fee to the provider with the bulk billing contract as well as pay a subscription fee to the new service provider… Do these arrangements have the

same practical effect as exclusive access arrangements in that most customers would be dissuaded from switching video providers?"

Generally speaking, they do, but in the most egregious cases they do not. They differ mainly where a provider's service is so poor that customers either (a) would rather receive no service at all than pay for inferior service or (b) would rather pay fees to two providers in order to receive acceptable service. With exclusive access arrangements, consumers who are dissatisfied have the option to pay nothing, and receive no service, but have no means to obtain acceptable service. With "bulk billing" arrangements, customers who are dissatisfied must pay the provider, even if they do not use the service. However, some elect to obtain acceptable service by paying a reasonable amount to "a better provider", *in addition to* the required payment of "too much for sub-standard service" to the contracted provider, even though they "do not use" the services of the latter provider.[78] In the most extreme cases, a service provider provides no usable service at all. In these cases, an exclusive access arrangement is the same as a complete ban on receiving service, and a bulk billing arrangement is simply a pretext for an indirect rent increase, which tenants must pay without receiving anything useful in return, in addition to whatever amounts they may or may not choose to pay another provider for usable service. Although these situations are both unacceptable, and should both be illegal, they are not the same as each other.

[78] Comment submitted by Sandra K. Nelson, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817107